No. 80-186

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT L. WRIGHT,
Petitioner,

versus

THE STATE OF GEORGIA,
Respondent.

On Petition for Writ of Certiorari to
The Court of Appeals of Georgia

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether or not the presumption as established in Georgia case law, which states that as between husband and wife there is a presumption of law that contraband found in the home . . . belongs to the husband, violates the husband's right of equal protection under the Fourteenth Amendment of the United States Constitution.

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No.

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To The Court of Appeals of Georgia

PETITION FOR CERTIORARI

Petitioner, ROBERT L. WRIGHT, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of Georgia entered in this proceeding on April 10, 1980.

OFFICIAL OPINION OF THE COURT BELOW

Wright, et al v. The State, Number 59513, ____ Ga. App. ____; ____ SE 2d ____ (1980).

JURISDICTION

The original decision and judgment in the case of Robert L. Wright v. The State in the Court of Appeals of Georgia was rendered and filed on April 10, 1980. Within time provided by law, the Petitioner filed a Motion for Rehearing in the Court of Appeals of Georgia, said Motion being overruled and denied by the Court of Appeals on April 24, 1980. As provided by law and within time, the Petitioner filed an Application for Writ of Certiorari to the Supreme Court of Georgia, which was denied May 28, 1980. Petitioner filed a timely Motion for Reconsideration of his Application for Writ of Certiorari which was denied June 9, 1980. This Court's jurisdiction is invoked under Title 28, USC Sec. 1257(3).

THE CONSTITUTIONAL PROVISION INVOLVED AND THE STATE LAW UNDER ATTACK

The Constitutional Provision involved: The Equal Protection Clause of the Fourteenth Amendment:

> . . . no state shall make or enforce any law which shall . . . deny to any person in its jurisdiction the equal protection of the law.

The State Law under attack: *Harper v. The State*, 85 Ga.App. 252, 69 S.E.2d 102 (1952):

> As between husband and wife there is a presumption of law that (contraband) found in the home . . . belongs to the husband.

STATEMENT OF THE CASE

Petitioner and his wife were indicted May 29, 1979, by the Toombs County Grand Jury on a two-count Indictment charging Petitioner and his wife with possession with intent to distribute marijuana and possession of cocaine (R. 4-5). Petitioner and his wife were found guilty of the charges in the indictment (R. 4; T. 138-139).

The police entered the residence of the petitioner pursuant to a search warrant (T. 8-9). The Petitioner as well as his wife admitted at the trial that the residence was their home since 1972 (T. 99). As police entered the home through the front door, the Petitioner and a third party were either in the living room (T. 54, 85) or in a room next to the living room (T. 12).

The third party was observed to be smoking what appeared to police officers to be marijuana (T. 27). Petitioner admitted he was smoking marijuana at the time of the police raid, however he claimed that the marijuana belonged to the third party and further denied any knowledge of further marijuana in the house (T. 110). The police officer further observed

what appeared to be marijuana in an ashtray in the living room (T. 53-54).

Upon searching what appeared to be a child's bedroom, a police officer found a quantity of marijuana concealed under a pile of clothes in a chair (T. 13-14). The Petitioner's wife confirmed that this room was normally occupied by their child (T. 7).

Upo searching another bedroom, which appeared to be the master bedroom, marijuana was discovered in plain view on the top of the dresser (T. 32-34; 40, 42). A metric weighing device was also in plain view on the dresser (T. 32, 34) The items on the dresser could be easily observed from the door to the room (T. 49) and from several positions in the nearby kitchen (T. 50). The bedroom door was open when police arrived. (T. 51). Other items found on top of the dresser included a quantity of plastic bags and small brown envelopes (T. 33-37; 38). A tin can containing $1,399.00 (T. 35-36) and a cigar box containing $191.00 (T. 38-39), and another box containing $688.00 was discovered in a chest of drawers in the bedroom (T. 48). A small spoon bearing residue of cocaine was found in the closet in the same bedroom (T. 47). The Petitioner testified that the third party present when the police entered the room was the brother of the Petitioner and that he lived with the Petitioner and his wife for approximately a month and a half (T. 86-87; 109). They

further testified that he had a key to the house (T. 87; 109) and had full access to the house (T. 89). He alternately slept on the living room couch and in the child's bedroom (T. 88; 109).

The Petitioner and his wife were found guilty of the charges in the indictment (T. 138-139). Upon appeal, petitioner's wife's conviction based upon the presumption of Georgia Law that as between husband and wife it is presumed that the contraband found in their home belonged to the husband (Appendix, p. 3a). The jury was not charged as to the presumption (T. 123-136). The presumption was first applied by the Court of Appeals of Georgia in its original Opinion which affirmed the Petitioner's conviction.

REASONS FOR GRANTING THE WRIT

The Court of Appeals of Georgia in sustaining Petitioner's conviction on the presumption of law that as between husband and wife contraband found in the home . . . belongs to the husband violated Petitioner's right of equal protection.

The Petitioner and his wife occupied a rented home in which Petitioner's brother also resided. (T 86-87, 88, 99, 109) The evidence showed the brother had full access to the house. (T. 99). The Court of Appeals of

Georgia failed to reverse the Petitioner's conviction based on the "Equal Access" Doctrine as stated in *Reed v. The State*, 127 Ga.App. 458, 194 S.E.2d 121 (1972). The Court of Appeals in failing to reverse the Petitioner's conviction in regards to the equal access doctrine essentially held that the contraband either belonged to the petitioner or his wife.

As between the Petitioner and his wife, the Court of Appeals states "it is presumed that contraband found in their home . . . belonged to the (Petitioner)", since there was no evidence linking the contraband to the Petitioner's wife. (See Appendix, p. 3a). *Harper v. State*, 85 Ga.App. 252, 69 S.E.2d 102 (1952). Thus, the Petitioner's conviction was upheld based on the presumption that the contraband found in the home belonged to the husband.

The presumption upon which the Court of Appeals of Georgia used to uphold the Petitioner's conviction is unconstitutional in that it violates the Equal Protection Clause of the Fourteenth Amendment. The presumption of law as established by Georgia case law "provides that different treatment be accorded . . . on the basis of sex". Since the case law establishes a classification based on sex, it is subject to scrutiny under the Equal Protection Clause. *Reed v. Reed*, 404 U.S. 71, 75; 92 S.Ct. 251, 253 (1971). The classification is subject to scrutiny even though it expressly discriminates against the male gender rather than the female gender. *Craig v. Boren*,

429U.S. 190; 97S.Ct. 451 (1976). The classification by gender will not withstand scrutiny under the Equal Protection Clause unless it serves some "important governmental objectives" and it is "substantially related to achievement of those objectives." *Califano v. Webster*, 430 U.S. 313, 316-317; 97 S.Ct. 1192, 1194 (1970).

The presumption used in sustaining Petitioner's conviction is based on "the doctrine that when husband and wife live together, the house in which they live and all property in the house, are in the legal possession of the husband as the head of the family". *Smith v. Berman*, 8 Ga.App. 262, 271; 68 S.E. 1014, 1021 (1910); *Young v. The State*, 22 Ga.App. 111; 95 S.E. 478 (1918); *Harper v. State*, 85 Ga.App. 252; 69 S.E.2d 102 (1952). The objective of the presumption is to place the family responsibilities upon the husband, with the wife playing the dependent role. As has been held by this court in *Stanton v. Stanton*, 421 U.S. 7; 95 S.Ct. 1373 (1975); *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102 (1979), the concept that generally it is the male's primary responsibility to provide a home and the essentials for his family can no longer justify a law that discriminates on the basis of gender. The presumption used to sustain the Petitioner's conviction being based on such a concept is violative of the Equal Protection Clause and unless the Decision of the Court of Appeals of Georgia is reversed, the Court will allow a manifest injustice to go unremedied.

CONCLUSION

In view of the controlling Supreme Court authority cited above, the Court of Appeals of Georgia erred in upholding the Petitioner's conviction based on the unconstitutional presumption of Georgia Case law that as between husband and wife contraband found in their home belongs to the husband.

It is respectfully submitted that the Opinion of the Court of Appeals of Georgia was in error and Petitioner's conviction should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served three copies of the foregoing Petition for Writ of Certiorari to the Court of Appeals of Georgia upon:

Mr. Richard A. Malone
Assistant District Attorney
Middle Judicial Circuit
P.O. Box 286
Swainsboro, GA 30401

by depositing same, in a properly addressed envelope, with adequate postage thereon, in the United States Mail as per United States Supreme Court Rule 28.2 and 28.5(b).

This is to further certify that all parties required to be served have been served.

This ___ day of August, 1980.

Paul W. Calhoun, Jr.
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APPENDIX

Apr. 10, 1980

59513. WRIGHT et al v. THE STATE.

DEEN, Chief Judge.

Robert and Cynthia Wright were convicted by a jury of two counts of violating the Georgia Controlled Substances Act. (Possession of marijuana with intent to distribute and possession of cocaine.) Cynthia was sentenced to seven years on each count to be served concurrently with the last four years on probation and a $500 fine to be paid six months after release from prison. Robert was sentenced to nine years on each count to be served concurrently with the last four years on probation and a $500 fine to be paid six months after release from prison. They bring this appeal following the denial of their motion for a new trial.

1. They first assert the general grounds. The evidence showed that a police officer had probable cause to obtain a search warrant for a house rented by Robert Wright. When the warrant was executed, the Wrights and Robert Wright's brother were sitting in the living room and the men were smoking marijuana. During the ensuing search, two plastic bags containing approximately two pounds of marijuana were found beneath some clothing on a chair in a child's bedroom, a small quantity of marijuana was discovered in plain view on top of a dresser in the master bedroom along

with a metric scale, some ziplock plastic bags, several small brown "coin" envelopes, a tin can containing $1,399 and a cigar box containing $199. A box containing $1,688 was found in a drawer containing women's underclothes and a small silver colored spoon bearing 1.5 grams of cocaine residue was found in the master bedroom closet. Appellants testified that Robert Wright's brother had resided with them for one and one-half months, that he had full access to the house including keys to the house, their car and their barbecue business, and that he slept in the child's bedroom.

It is well established that "[a]s between husband and wife there is a presumption of law that [contraband] found in the home . . . belongs to the husband. . . But such a presumption cannot be broadened to include all relatives who may be living in the same house with the defendant" and have equal access to it. *Harper v. State*, 85 Ga.App. 252, 254 (69 S.E.2d 102) (1952). The equal access rule applies to contraband that is for the most part in "open, notorious and easily accessible areas." *Kenerbler v. State*, 137 Ga.App. 618 (224 S.E.2d 476) (1976). In the present case, appellants have affirmatively shown that Robert's brother had an equal opportunity to possess the marijuana found in the child's room. *Brown v. State*, 130 Ga.App. 11 (202 S.E.2d 268) (1973). However, as to the marijuana found in plain view on top of the dresser in the master bedroom, Robert Wright's admission that he occupied the room and that he was

smoking marijuana when the police arrived would authorize a jury to find that he possessed the contraband. *Tuggle v. State*, 149 Ga.App. 634 (____ S.E.2d ____) (1979). As between Cynthia and Robert Wright, it is presumed that the contraband found in their bedroom belonged to Robert, *Harper v. State*, supra, and there was no evidence to link Cynthia to possession of either the marijuana or the spoon bearing cocaine residue and her conviction must be reversed.

While mere possession of contraband without more will not serve as the basis for a conviction for possessing contraband for purposes of sale, *Crider v. State*, 98 Ga. App. 164 (105 S.E.2d 506)(1958), Robert Wright's testimony that the scale, plastic bags, coin envelopes, and cash found on top of the dresser belong to him would authorize a jury to infer that he possessed marijuana with intent to sell it. *Bell v. State*, 35 Ga. App. 465 (134 S.E. 120)(1926).

2. Appellants next contend that the amount of cocaine (1/200th of an ounce) found on the spoon was insufficient to constitute an offense under Georgia law. As an expert witness from the State Crime Laboratory was able to identify the residue on the spoon as cocaine, a sufficient quantity of contraband was present to support Robert Wright's conviction for possession. *Partain v. State*, 139 Ga. App. 325 (228 S.E.2d 292)(1976).

3. In their final argument, appellants contend that the trial court erred by imposing a $500 fine upon each as a condition of probation. Under Code Ann. §27-2529, a judge may "by any law so authorizing, place on probation any person convicted of a felony, such judge may in his discretion fine such a person so convicted not more than $2,000 as a condition to such probation." This enumeration is without merit as to Robert Wright.

Accordingly, Robert Wright's convictions are affirmed and Cynthia Wright's are reversed.

Judgment affirmed in part and reversed in part. Birdsong and Sognier, JJ., concur.

COURT OF APPEALS
of the State of Georgia

ATLANTA, April 24, 1980

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

59513 Robert L. Wright et al v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, Apr. 24, 1980

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS
CLERK.

CLERK'S OFFICE
SUPREME COURT OF GEORGIA

Atlanta, May 28, 1980

Dear Sir:

Case No. 36420 Wright v. The State

The Supreme Court today denied the writ of certiorari in this case. All the justices concur, except Hill, J., dissents.

Very Truly yours,
MRS. JOLINE B. WILLIAMS, Clerk

CLERK'S OFFICE
SUPREME COURT OF GEORGIA

Atlanta, June 9, 1980

Dear Sir:

The motion for a reconsideration was denied today:

Case No. 36420. Wright v. State

Undercofler, C.J., Hill & Clarke, JJ., dissent.

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

60 days
Aug. 8

Supreme Court, U.S.
FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

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OCTOBER TERM, 1980

ROBERT L. WRIGHT,

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STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether Petitioner has standing to challenge a presumption which was not applied against him and did not contribute to his conviction.

2.

Whether a federal question is properly presented for review by this Court when the highest court of the state rendered no opinion on the issue and the decision by that court might have rested upon a nonfederal ground.

3.

Whether the court-established presumption which only creates a rebuttable presumption concerning possession of contraband creates a classification subject to scrutiny under the equal protection clause of the fourteenth amendment.

I.

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Robert L. Wright, and his wife, Cynthia Wright, were indicted May 29, 1979, in

Toombs County, Georgia, on two counts of violations of the Georgia Controlled Substances Act. Count One alleged possession of marijuana with intent to distribute, and Count Two alleged possession of cocaine. (R. 4-5). At the conclusion of a jury trial conducted on August 27-28, 1979, Petitioner and his wife were found guilty on both charges. (R. 4).

The evidence at trial showed that police officers entered the residence of the Petitioner and his wife pursuant to a search warrant the validity of which was unchallenged at trial. (T. 8-9). Both Petitioner and his wife admitted that they had resided at the premises since 1972. (T. 99). On entering the house, the police observed the Petitioner, his wife and a third party. The third party was later determined to be the brother of the Petitioner. The Petitioner's brother was observed smoking

marijuana at the time the police officers entered the home. (T. 27). Petitioner admitted that he had been smoking marijuana at the time of the police raid, although claiming that the marijuana belonged to his brother. (T. 110). Police officers also observed what appeared to be marijuana in an ashtray in the living room. (T. 53-54).

The police officers discovered an additional quantity of marijuana concealed under clothes in a chair in what appeared to be a child's bedroom. (T. 13-14). It was determined at trial that this room was normally occupied by the Petitioner's child, although the Petitioner's brother also slept in the room on occasion. In what was determined to be the master bedroom, the police officers discovered marijuana in plain view on top of the dresser. (T. 32-34, 40, 42). The officers

also discovered a set of metric scales in plain view on the dresser. Other items found on top of the dresser included a quantity of plastic bags and small brown envelopes, a tin can containing $1,399.00 and a cigar box containing $191.00. (T. 33-39). The officers discovered another box containing $1,688.00 in a chest of drawers in the same bedroom. (T. 48). A small spoon bearing a residue of cocaine was found in a closet in the bedroom. (T. 47).

An expert witness called by the State at trial identified the substances found in the house as being marijuana and the residues on the spoon as being cocaine. (T. 64). The total weight of the marijuana found was two pounds two point seven ounces. (T. 66-67). The cocaine residue measured one point five grams. (T. 66).

Petitioner and his wife testified that Petitioner's brother had lived in the house for approximately a month and a half. They further testified that he had a key to the house and that he alternately slept in the living room and in the child's bedroom.

The jury was charged on circumstantial evidence, presence at the scene, possession and the "equal access" doctrine. (T. 127-131). The jury returned verdicts of guilty on each count as to the Petitioner and his wife. On September 15, 1979, the court sentenced Petitioner to nine years on each count to run concurrently with five years to be served followed by four years on probation conditioned upon the payment of a $500.00 fine within six months of his release from prison. (R. 9). Petitioner's wife, Cynthia Wright, was sentenced to seven years on each count to run concurrently with three years to be served

followed by four years probation conditioned upon the payment of a $500.00 fine within six months of her release from prison. (R. 11). The motion for new trial was overruled. (R. 27).

Petitioner and his wife subsequently appealed to the Court of Appeals of Georgia. That court found that the Petitioner's brother had an equal opportunity to possess the marijuana found in the child's room; however, there was sufficient evidence to find that the Petitioner possessed the contraband found in the master bedroom. Wright v. State, 154 Ga. App. 400, 401, __ S.E.2d __ (1980). The court then determined that it was presumed that the contraband found in the master bedroom belonged to the Petitioner based on the presumption that contraband found in the home belonged to the head of the household. The court further noted that there was no evidence to link Petitioner's wife to possession of any of the

contraband. Wright, supra. The court thus reversed the convictions of Petitioner's wife, but affirmed the convictions of the Petitioner.

Petitioner filed a motion for rehearing in the Court of Appeals of Georgia. In this motion, Petitioner only argued that the court misapplied Georgia law, in particular, the "equal access" doctrine. Petitioner did not raise the constitutionality of the presumption at this time. The motion for rehearing was denied by the Court of Appeals of Georgia on April 24, 1980.

Petitioner filed a petition for a writ of certiorari in the Supreme Court of Georgia. In this application, Petitioner asserted for the first time, the question of the constitutionality of the presumption set out by the Court of Appeals of Georgia. The

Supreme Court of Georgia denied the application on May 28, 1980. The court denied the motion for reconsideration on June 9, 1980. A petition for certiorari was filed in this Court on August 7, 1980.

Further facts will be developed as necessary for a more thorough consideration of the issues raised by the present petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. PETITIONER DOES NOT HAVE STANDING TO ATTACK A PRESUMPTION WHICH DID NOT CONTRIBUTE TO HIS CONVICTION, BUT WAS ONLY RAISED ON DIRECT APPEAL IN REVERSING THE CONVICTION OF PETITIONER'S WIFE.

After evidence was presented to the jury, the trial court charged the jury on various points of law. At no time did the court charge the jury that the head of the household is presumed to be in possession of contraband found in the home. The court charged the jury as to reasonable doubt. The court also included a charge on direct and circumstantial evidence as well as the requirement that a case resting entirely on circumstantial evidence be inconsistent with any reasonable theory of innocence.

(T. 127). The court charged the jury on the "equal access" doctrine. (T. 129). The court also charged that merely finding contraband on the premises was not sufficient if it appeared that other persons had equal opportunity to commit the crime. After explaining the different offenses charged, the court explained what the law recognizes as possession. The court charged on actual and constructive possession, as well as sole or joint possession. (T. 131). The jury clearly determined that the evidence was sufficient to show possession on the part of the Petitioner.

On direct appeal to the Court of Appeals of Georgia, the presumption raised in the instant case was first mentioned in the brief filed on behalf of the Petitioner.[1]

1/ Petitioner and his wife filed a joint appeal with both being listed as appellants. Petitioner's counsel at that time was the same as the present counsel in this Court.

In the brief submitted on behalf of the Petitioner to the Georgia Court of Appeals, the following was stated:

> "The State contends that Robert L. Wright was the head of the household, which is not denied by him. Also it is well-settled that where contraband is found in a house, the presumption is that such contraband was possessed by the head of the household."

(Appellant's brief, 8).[2] Thus, the Petitioner freely admitted that he was the head of the household and admitted that the presumption existed that contraband in the house was possessed by the head of the household.

In ruling on the general grounds raised by the Petitioner and his wife, the Court of Appeals asserted the presumption first set out by the

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2/ The brief on behalf of the Appellants (Petitioner and his wife) is included in the record of the Court of Appeals of the State of Georgia. This quotation is from page eight of that brief, the second paragraph.

Petitioner. The court first set out this presumption in finding that Petitioner's brother did not come within this ruling. The court quoted the original case setting out this presumption and noted, "but such a presumption cannot be broadened to include all relatives who may be living in the same house with the defendant." Wright, supra at 401, quoting Harper v. State, 85 Ga. App. 252, 254, 69 S.E.2d 102 (1952). Thus, the court was not applying this presumption to the Petitioner, but was using this presumption to show that the "equal access" doctrine would apply as between the Petitioner and his brother. The court went on to note that based on the facts, that is, that many items serving as the basis for the conviction were found in the master bedroom and were not in "open, notorious, easily accessible areas," then this doctrine would not apply. Wright, supra at 401, quoting Kenerbler v. State, 137 Ga. App. 618, 224 S.E.2d 476 (1976). The

court found that the Petitioner's brother had equal opportunity to possess the marijuana found in the child's bedroom, but based on the admission by the Petitioner, the court could find that he possessed the contraband found in the master bedroom. The court then once again used the presumption to find that there was no evidence to link Petitioner's wife to possession of either the marijuana or the spoon bearing cocaine residue. Thus, the court used the presumption only to reverse the conviction of Petitioner's wife as there was no other evidence to support a conviction.

After the court found that there was no evidence to support a conviction of Cynthia Wright, and that there was evidence to show possession on behalf of Robert Wright of the evidence found in the master bedroom, the

court went on to find that there was additional evidence to support Petitioner's conviction. The court noted that mere possession of the contraband would not serve as a basis for conviction for possession with intent to distribute without additional evidence. Crider v. State, 98 Ga. App. 164, 105 S.E.2d 506 (1958). The court noted that Petitioner testified that the metric scale, plastic bags, coin envelopes and cash found on top of the dresser belonged to him. The court found that this would authorize the jury to find that the Petitioner possessed marijuana with intent to sell. Wright, supra at 402, citing Bell v. State, 35 Ga. App. 465, 134 S.E. 120 (1926).

It is clear from the holding of the Court of Appeals of Georgia and from the charge of the trial court, that the presumption challenged by the present petition was not applied

to the Petitioner at trial and in no way contributed to his conviction. The presumption was only used for the first time by the Court of Appeals after being mentioned by the Petitioner in his brief to that court. At that time, the presumption was not applied to uphold the Petitioner's conviction as he was found to have possession of the items based on other evidence. The presumption was only used to reverse the conviction of Petitioner's wife. Furthermore, Petitioner freely admitted in his brief to the Court of Appeals of Georgia that he was the head of the household. Thus, there was no need to apply this presumption to the Petitioner.

This Court continually held that it is bound by the requirements of a case in controversy and standing set out in Article III of the United States Constitution. Doremus v. Board of Education, 342 U.S. 429 (1952). The party

attempting to invoke the power of this Court must not only show that a law is invalid, but must show that he "has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement. . . ." Massachusetts v. Mellon, 262 U.S. 447 (1923). In cases in which a particular statute was not applied to the individual seeking review by this Court, this Court has found that there is no standing to challenge the constitutionality of a state law. New York Civil Service Commission v. Snead, 425 U.S. 457 (1976).

Respondent submits that the Petitioner has not shown that he has standing to raise the constitutionality of the presumption raised in the present petition. It has been shown that the presumption was not applied to the Petitioner at trial. The presumption was applied on direct appeal to reverse the conviction

of the Petitioner's wife. The court did not apply it to the Petitioner because he admitted he was head of the household and there was other evidence linking Petitioner to the crime. Petitioner has not shown that he has sustained any injury as a result of the application of the presumption to his wife. Thus, the Petitioner has no standing to raise the issue of the constitutionality of the presumption in the instant case and this Court should decline to grant certiorari.

B. THE HIGHEST COURT OF THE STATE OF GEORGIA RENDERED NO OPINION ON THE ISSUE REGARDING THE PRESUMPTION CHALLENGED BY PETITIONER AND THE JUDGMENT OF THAT COURT MIGHT HAVE RESTED UPON A NONFEDERAL GROUND.

It is clear in the present case that Petitioner did not assert the alleged constitutional violation raised by his petition prior to his filing an application for certiorari in the Supreme Court of Georgia. Respondent recognizes that the presumption was not presented by any court until the decision was rendered by the Georgia Court of Appeals affirming Petitioner's conviction. Petitioner had the opportunity to raise the constitutionality of the presumption in his motion for rehearing to that court, but did not do so.

The issue was raised for the first time in the Supreme Court of Georgia. No opinion was rendered by that court when it denied the petition. No opinion was given when the Supreme Court denied the motion for reconsideration. It is well-recognized by this Court that where the highest court of a state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review an alleged federal constitutional question. Stembridge v. Georgia, 343 U.S. 541, 547 (1952). This Court has held that it would not take jurisdiction on a petition for certiorari when the question of the existence of an adequate state ground was debatable.

Respondent asserts that in the case at bar, the Supreme Court of Georgia could have denied the application based on a state ground without

considering the federal constitutional issue. The court could reasonably have determined that the Petitioner had not properly presented the issue for review by the Court of Appeals at his earliest opportunity to do so, that is, on his motion for rehearing in that court. The Georgia court could also have determined that the presumption did not affect Petitioner's conviction, but only served to reverse the conviction of Petitioner's wife. Under this reasoning, the presumption did not contribute in the least to Petitioner's present conviction and sentence. As the presumption was not even used by the trial court and was mentioned for the first time on direct appeal, it is clear that neither the jury nor the trial court used the presumption to find the Petitioner guilty.

Respondent asserts that it can be found that the Supreme Court of Georgia did not consider

the equal protection argument presented at this time by the Petitioner. The court could have determined that there was not a proper and timely presentation of this issue or that it did not contribute to Petitioner's conviction. Thus, this Court should decline to grant certiorari to review this issue as there might have been a nonfederal ground to support the judgment of the Supreme Court of Georgia.

C. A COURT-ESTABLISHED REBUTTABLE PRESUMPTION CONCERNING POSSESSION OF CONTRABAND DOES NOT CREATE A CLASSIFICATION SUBJECT TO SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Assuming this Court determines that Petitioner does have standing and that the issue presented by the petition is properly raised, Respondent submits that Petitioner has not shown that the courts of Georgia have set up an impermissible classification in violation of the equal protection clause. Respondent submits that the presumption attacked in the case at bar is merely a court-established rebuttable presumption and not a classification.

Petitioner is attacking in the instant petition the presumption used by the Georgia Court of Appeals that contraband found in the home belongs

to the head of the household and that the head of the household is presumed to be the husband unless otherwise shown. Goode v. State, 130 Ga. App. 791, 204 S.E.2d 526 (1974). As shown by the language used in the decision of the Court of Appeals, this is merely a presumption of law established by the courts of Georgia. The presumption is clearly rebuttable.

The cases relied upon by the Petitioner in his equal protection analysis clearly relate to statutory classifications created by legislatures in various states. These classifications do more than establish rebuttable presumptions, they establish distinct classifications of persons that are not subject to rebuttal or contradiction. In these situations, an individual is not presented with an opportunity to show that the classification is inappropriate unless he challenges

the constitutionality of the classification. In the presumption set out in the instant case, there is no classification.

A presumption differs from a classification in many respects. A presumption of law is merely a rule that courts and judges should draw a particular inference from a particular fact or set of facts until the presumption is shown to be untrue. A classification is a specific grouping into classes or an arranging of persons into different categories. Black's Law Dictionary 315-316, 1349 (4th Ed. 1951). Under these definitions, it is clear that the Georgia courts have not set out any sort of classification in the instant case, but have merely established a presumption of law which the courts are allowed to infer from particular facts. Before this presumption can even be applied, it must be shown that the

person to whom the presumption is applied could be considered the head of the household. The courts then presume that the head of the household is in possession of contraband found in the home as the head of the household is normally the individual either owning the home or paying the rent. In the instant case, the Petitioner admitted in his brief to the Court of Appeals that he was the head of the household. Therefore, the court presumed that he was in possession of the marijuana. As noted previously, this would not be sufficient to uphold the conviction for intent to distribute, but the court did find other evidence to support the conviction. As to the cocaine found in the bedroom closet, the court used the presumption to find that there was evidence to show that the Petitioner did possess the cocaine. The presumption was merely one portion of the case

against the Petitioner. The court noted that there was other evidence that would support a finding that some of the contraband belonged to the Petitioner.

As it has been shown that the presumption challenged is not a classification by gender, but a presumption of law, Respondent submits that as such, it is not subject to the equal protection challenge presented by the Petitioner. The presumption does not classify individuals, but merely makes a presumption based on a set of facts which can be rebutted. In the cases cited by the Petitioner, the legislatures have gone further and established rigid classifications in which individuals similarly situated are treated differently without any opportunity to rebut the effect of the statute. See e.g., Orr v. Orr, 440 U.S. 268 (1979); Stanton v. Stanton, 421 U.S. 7 (1975); Reed v. Reed, 404 U.S. 71 (1971).

Thus, Respondent submits that the presumption attacked in the instant case does not create a classification that is violative of the equal protection clause, but merely sets up a rebuttable presumption for use by the courts. This presumption has a rational basis for the inference that is drawn from a particular set of facts. Thus, there have been no violations of Petitioner's federal constitutional rights under the fourteenth amendment.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Robert L. Wright.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, a Member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States Mail with proper address and adequate postage to:

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This 12th day of September, 1980.

/s/
JOHN C. WALDEN